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BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY

The questions presented are limited to Rules of Civil Procedure 50(a), 50(b), 38 and 61.

The order granting *certiorari* is "limited to the questions of federal procedure raised by the petition for the writ" (R. 150).

The construction of this limitation by counsel for respondent is expressed in the reservation which they inserted in the stipulation covering the printing of the record (R. 151).

Counsel for respondent submit that there are only three questions for consideration by this Court, to wit:

I. Were the grounds of the motion to direct a verdict sufficiently stated under Rule 50(a)?

II. Did the Circuit Court of Appeals have the power to direct entry of judgment in favor of defendant under Rule 50(b), notwithstanding that defendant had made no motion for judgment *non obstante veredicto?*

III. What effect, if any, have Rules of Civil Procedure 38 and 61 on this case?

Counsel recognize, however, that the extent of the review is a question for the Court's own determination, and, therefore, add to this brief some comment in answer to the argument going to the merits that constitutes the brief for petitioner.

This additional argument in behalf of respondent is found under the question stated as follows:

IV. Was there error below going to the merits?

If respondent's view as to the limit of the review is sustained, Question IV may be entirely disregarded.

STATEMENT OF THE CASE

Counsel for respondent desire to question the accuracy of a number of assertions that appear in the brief for petitioner—in particular, some relating to the existence and effect of the evidence in the record. But respondent's counsel are convinced that the limitation in the order granting the writ excludes from review all questions relating to the sufficiency of the evidence and rulings in respect of the admission thereof. Counsel crave indulgence, therefore, to first present their Questions I, II and III and to discuss all questions going to the merits under their Question IV.

Counsel for respondent submit that the opinion below carries a comprehensive statement of the case leading up to the questions that will be reviewed by this Court.

ARGUMENT

I

Were the grounds of the motion to direct a verdict sufficiently stated under Rule 50(a)?

The contention of opposing counsel is presented on page 10 of their printed brief, from which the following portion of a paragraph is quoted:

> "* * * The defendant's motion is quoted at R. 42, and applying Rule 50(a) of the Rules of Civil Procedure, the specific grounds of the defendant's motion were 'The proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant, not in the plaintiff, as he attempted to show.' The defendant's motion did not give as grounds that the defendant had under all the evidence proved superior possession. * * *"

The question presented here centers on the last sentence of Rule 50(a), which reads: "A motion for a directed verdict shall state the specific grounds therefor."

The quotation made above and stated by petitioner's counsel to constitute the "specific grounds of the defendant's motion" was only one sentence out of a paragraph containing three sentences (R. 42-43). Further, the paragraph quoted from was only one paragraph out of six devoted to the statement and argument of the motion and the incidental colloquy with the trial judge. These together comprise more than a page of the printed record (R. 42-44).

Preceding the sentence quoted by petitioner, defendant's counsel had commenced the motion in this language:

"* * * If your Honor please, our motion is for a direction of verdict on the ground that there can be but one reasonable conclusion from the evidence and that is that the judgment should be for the defendant. The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss. * * *" (R. 42-43.)

The motion to direct a verdict was in effect a renewal of the motion to dismiss which had been made at the conclusion of plaintiff's testimony, both as to the grounds thereof and, in part, as to the argument thereon (R. 41-42). Defendant in its testimony had proved its deed in 1924 and actual and continuous possession by defendant of the land in question from that date down to the alleged trespass in 1941, so that there was this subsequent and additional testimony before the court, when the motion to direct a verdict was made, going to disprove plaintiff's claim of either title or possession. This was affirmative evidence tending to show title and possession in defendant and thereby negativing either title or possession in plaintiff at the time of the trespass.

The grounds of the previous motion to dismiss are quoted (R. 41) as follows:

"1. The plaintiff has failed to prove that he has title to the property.

"2. The plaintiff has failed to prove that he had possession of the property at the time of the alleged trespass.

"3. That the plaintiff has failed to prove that the defendant, in September, 1941, cut, removed and sold the timber alleged to have been cut."

The trial judge, after disposing of the third ground (which is not pertinent here), then said (R. 42):

"I don't think the plaintiff has put up very strong possession testimony but he said he had been on and off the property for a great many years.

"(After further argument by Mr. Waring on the three grounds):

"I shall refuse the motion."

The stenographic transcript of the motion for a directed verdict is sketchy; apparently defendant's attorney made some remarks which the stenographer omitted and others which she summarized. The motion was made in sections, because the trial judge interrupted counsel, from time to time, to express his views as to the effect of the testimony (R. 42-44).

After his first sentence, *supra*, defendant's attorney said "The motion is based somewhat on the same argument that was presented to your Honor on the motion to dismiss," and then went on to assert, first, that defendant's proof substantiated title in defendant and not in plaintiff (R. 43). There was further argument following this assertion which was not taken down by the stenographer. The trial judge then interposed remarks *in re* the effect of plaintiff's testimony, as to both possession and title (R. 43), and, following a statement by counsel, the trial judge recalled that plaintiff "said he went on there and cut some boards and hunted," etc. Thereupon defendant's attorney argued "as to showing of possession of this property in September, 1941" (R. 43). The trial judge replied that plaintiff "doesn't have to show possession that month"; then discussed defendant's evidence of possession, and ended with a reference to plaintiff's argument that defendant's evidence showed a mere illegal entry and not possession (R. 43). Following this colloquy, the motion for directed verdict was completed by defendant's attorney by reference to the third ground of the motion to dismiss,

which is not pertinent here. Following this, the trial judge made his ruling on the entire motion, to wit (R. 44):

> "The Court: I passed on the proposition yesterday. If I was wrong yesterday I am wrong today. I think this is a jury question. I am not going to discuss how strong or how weak it may be, it is not necessary for me to do that. It is an issue of fact. Motion refused. I assume Mr. Waring notes an exception."

In the face of this record, it is submitted that there is no basis for petitioner's contention.

The test whether a motion for a directed verdict states the specific ground therefor within the meaning of Rule 50(a) is well stated in *Virginia Carolina T. & W. Co. v. Dunbar* (C. C. A., 4th), 106 F. (2d), 383, 385: "* * * And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by rule 50-(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. * * *"

This statement was quoted with approval and this test followed in *Ryan Distr. Co. v. Caley* (C. C. A., 3rd), decided January 17, 1945, 147 F. (2), 138, 140, and the Court added: "The basis of the motion was perfectly clear to both Court and parties both in the trial court and upon this appeal."

Texas has adopted verbatim Rule 50(a) as Rule 268 of Texas Rules of Civil Procedure. The Court of Civil Ap-

peals of that State adopted this test in *Patrick v. McGaha* (1942), 164 S. W. (2), 236, and *Rudco Oil & Gas Co. v. Gulf Oil Co.* (1943), 169 S. W. (2), 791.

The propriety of considering both motions together in order to find the specific grounds required by Rule 50(a) is favorably considered in *Dawson v. McWilliams* (C. C. A., 5th, 1944), 146 F. (2), 38, 40. There defendants moved for a directed verdict at the close of plaintiff's evidence on the ground that the evidence "does not establish facts sufficient to create the cause of action in favor of the plaintiff * * * or to sustain a verdict in favor of the plaintiff * * *." At the close of all the evidence, the defendants moved the court peremptorily to instruct the jury to return a verdict in favor of defendants, stating no ground for this motion. Both motions were refused, and on appeal it was urged that the latter motion did not comply with Rule 50(a) because it did not state the specific ground therefor. The Court (at page 40) stated:

> "We think the two motions must be considered together; so considered, these motions do state the specific ground, namely, that the evidence does not establish facts sufficient to create a cause of action in favor of plaintiff or to sustain a verdict in favor of plaintiff."

The district court and opposing counsel below both understood that the motion to direct renewed the grounds of the motion to dismiss, to wit, that plaintiff had failed to prove either title or possession as of the time of the trespass. Opposing counsel below voiced no request for amplification or clarification of the grounds of the motion, or of the reasons upon which the motion was refused.

II

Did the Circuit Court of Appeals have the power to direct entry of judgment in favor of defendant under Rule 50(b), notwithstanding that defendant had made no motion for judgment *non obstante veredicto?*

As the basis for an intelligent and analytical discussion of the proper interpretation of Rule 50(b), it is necessary to consider the decisions which caused the rules committee to draft and propose the rule.

Slocum v. New York Life Ins. Co., 228 U. S., 364, 57 L. Ed., 879 (1913), a five-four decision, reversed the circuit court of appeals for directing a judgment notwithstanding the verdict as an infraction of the seventh amendment of the Federal Constitution and modified the judgment by substituting a direction for a new trial. It was fundamental in the reasoning that the appellate court by its action re-examined issues of fact, which the amendment expressly forbade, and that the common-law rule demanded that a new trial be ordered so that the right of trial by jury would be preserved.

In order to re-establish the trial judge's and appellate court's supervisory power, the federal courts resorted to the legal theory that where, on motion for a directed verdict at the close of all the evidence, questions of law, as distinguished from issues of fact, were expressly reserved by the court, the tribunal could *sua sponte* dismiss or direct judgment as might be appropriate.

This practice was approved in *Baltimore and Carolina Line v. Redman*, 295 U. S., 654, 79 L. Ed., 1636. The trial judge there had expressly reserved the question of law on a motion to dismiss on the ground that the evidence was insufficient to support a verdict for plaintiff, and, on a motion

for a directed verdict, on the same ground. Both motions were denied. The appellate court had reversed the judgment with a direction for a new trial. The Supreme Court held that the appellate court had erred and that its action should be modified by substituting a direction for judgment of dismissal on the merits. The *Slocum case* was distinguished on the ground that the motion for a directed verdict had been denied there without reservation of the question of the sufficiency of the evidence.

In the Redman opinion, the court referred to the well-established common-law practice of reserving questions of law arising during trial by jury and of taking the verdict subject to an ultimate ruling on such questions. It stated also that the reservation carried with it authority to make final disposition of the case as might be appropriate, such as entering judgment for one party, where the jury had found a verdict for the other, or making other essential adjustment. At page 660 it said:

> "Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course.
>
> * * * This court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant." (*Chinoweth v. Haskell*, 3 Pet., 92, 7 L. Ed., 614.)

Subsequent to these cases the Supreme Court decided *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 81 L. Ed. 1177 (1937). The lower court had failed to expressly reserve the

point of law after motion for directed verdict and plaintiff had later failed to move for judgment *non obstante veredicto*, as required by the state law (Pennsylvania). The Supreme Court reverted to the *Slocum case*, and modified the circuit court's direction to enter judgment for plaintiff by substituting an order for a new trial.

The Court said, incidentally, that since the plaintiff had failed to make the appropriate motion *non obstante veredicto*, as required by Pennsylvania law, the appellate court was without authority to direct entry of judgment for the plaintiff.

Apart from the effect of the *Slocum case*, Mr. Justice Butler's conclusion would have been the opposite if South Carolina procedure had been the controlling reference under the Conformity Act; that is to say, the Supreme Court of South Carolina under its Rule 27 (printed in Appendix B of respondent's brief in opp. to cert.) has express power to remand a case for entry of judgment after reversing the trial court for denying a motion to direct a verdict. This rule has been in effect for almost forty years and the practical application of it by the Supreme Court of South Carolina is illustrated by *Littleton v. Roberts*; 181 S. C., 303, 187 S. E., 349, a decision which the court below, in its consideration of the substantive law, properly found to be directly in point and conclusive on this phase of the evidence (R. 147, 153 F. (2), 581.) This case is later discussed herein under Question IV.

Although South Carolina Circuit Court Rule 79 (appendix C, brief in opp. to cert.) provides for a motion *non obstante veredicto*, it is immaterial to the power of the South Carolina Supreme Court under its Rule 27 whether the appealing party made or failed to make a motion for judgment notwithstanding the verdict in the trial court,

provided that he duly made a motion for a directed verdict at the appropriate time during the trial. *Bell v. A. C. L. R. Co.*, decided February 2, 1943, 202 S. C., 160, 176—note that the concurring opinion of Judge Fishburne (page 176) is the opinion of the court; 23 S. E. (2d), 177.

Since the adoption of Rule 50(b) this Court has granted *certiorari* in *Conway v. O'Brien*, 312 U. S., 492, 85 L. Ed., 969 (1941), *Berry v. United States*, 312 U. S., 450, 85 L. Ed., 945 (1941) and *Halliday v. United States*, 315 U. S., 94, 86 L. Ed., 711 (1942), all three of which involved the proper construction of the rule. In all three cases, however, the orders granting *certiorari* were unlimited; the Court reversed on other grounds and found it unnecessary to consider the procedural issue.

Rule 50(b) expressly and automatically reserves all questions of law for later determination by the court. It may properly be argued that the committee's purpose in so providing was to preclude the application of the *Slocum rule* where, through oversight, the trial judge failed to reserve. It may be argued further that the rule merely extends and crystallizes the practice approved in the *Redman case* and thus is a reaffirmation of the common-law rule, as stated in that opinion, pertaining to the existence of power in a federal court to reserve a question of law on proper motion, and after verdict *sua sponte* direct judgment for the movant. But basic in such an argument is the question: does Rule 50(b) modify the common law and the Redman rule by prescribing a condition precedent to the exercise of the same power by an appellate court, *i. e.*, the filing of a motion within ten days after verdict to set aside the verdict and enter judgment for the movant? Respondent answers the question in the negative. Respondent contends that the Court below correctly construed and applied Rule 50(b); that a motion for a directed verdict at the close of

all the evidence raises a question of law which is automatically reserved and remains in a suspended status, if denied or if neither denied nor granted, subject to the later determination of the appellate court. This contention has been sanctioned by all federal courts where the precise procedural circumstances of this case existed.

The second circuit has uniformly held that such is the proper interpretation. *Berry v. United States*, 111 F. (2), 615 (1940), 312 U. S., 450 (Rev. on other grds.); *Conway v. O'Brien*, 111 F. (2), 611 (1940), 312 U. S., 492 (Rev. on other grds.); *Limbershaft Sales Corp. v. A. G. Spalding and Bros.*, 111 F. (2), 675 (1940); *Fratta v. Grace Line, Inc.*, 139 F. (2), 743 (1943).

In the *Conway case*, Judge Learned Hand said at page 613:

> "* * * but Rule 50(b) provides that when such a motion is denied at the close of the evidence, the judge is to be 'deemed to have submitted the action to the jury subject to a later determination'; which is the equivalent of a reservation. It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence, it is proper here to dismiss the complaint."

Judge Swan, in the *Limbershaft case*, said at page 678:

> "Finding error in the denial of the defendant's motion for a directed verdict, we must reverse the judgment. Since decision on the motion was reserved until after verdict, we may direct a judgment of dismissal on the merits. *Baltimore & Carolina Line v. Redman*, * * *. Even without such reservation this may be done under the new Rules of Civil Procedure, * * *."

The fourth circuit has similarly so adjudged. The most detailed discussion of the question is found in *United*

States v. Halliday, 116 F. (2), 812 (1941), 315 U. S., 94 (Rev. on other grds.), wherein Judge Dobie, with an identical procedural question before him, stated at page 815:

> "The denial of the original motion for a directed verdict, it seems, is now treated as the equivalent of a reservation by the District Court. Accordingly, we believe that the Government's failure to move in the court below for judgment in its favor notwithstanding the verdict does not restrict our power in the premises."

Then, after declaring that the court could find nothing in the rule that restricts the court's power to so direct, where orderly administration of justice so requires, he goes on to say at page 816:

> "And this seems none the less true, even though verdict of the judge (jury) was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50(b) in the lower court a motion, after the verdict, 'to have the judgment entered in accordance with his motion for a directed verdict'."

In *Eastern Livestock Co-operative Marketing Ass'n, Inc., v. Dickenson*, 107 F. (2), 116 (1939), the same action was taken without discussion.

The Court of Appeals for the District of Columbia has also found such power in the appellate court. In *Howard University v. Cassell*, 126 F. (2), 6 (1941), (cert. den., 316 U. S., 675, rehearing den. 316 U. S., 711), again on the same exact procedural facts, the court said at page 12:

> "Here the defendant moved for a directed verdict on the ground of the statute of limitations at the close of the plaintiff's evidence and again at the close of all the evidence. The court denied the motions. After verdict, the defendant moved for a new trial but did not move within 10 days or at all to have the verdict

set aside and judgment entered in accordance with its motion for a directed verdict. However, the defense was not thereby waived, and the court's ruling may still be appealed from."

The Court then reversed and remanded with instructions to dismiss the complaint.

The eighth circuit, in *Lowden v. Bell*, 138 F. (2), 558 (1943), also finds this supervisory power in the appellate court, saying at page 560:

> "* * * Had the case been tried correctly, the appellants would have had a judgment in their favor determinative of the case. The fact that the appellants did not make a motion to set aside the verdict of the jury and for judgment notwithstanding the verdict, as they might have done under Rule 50(b), * * * does not preclude this Court from directing the trial court to enter the judgment to which the appellants were entitled under the evidence and the law. * * *"

The dictum at page 41, in *Atlantic Coast Line R. R. Co. v. Smith*, 135 F. (2), 40 (1943), indicates that the fifth circuit has also adopted respondent's view as to the proper construction of Rule 50(b):

> "* * *. The test of sufficiency of the evidence may be made on the trial and preserved for appeal purposes by timely motion for directed verdict * * *."

The tenth circuit is in accord; *Western Union Tel. Co. v. Dismang*, 106 F. (2), 362 (1939).

These cases are the only ones that counsel for respondent have found where the procedural facts are precisely those presented in this case.

It seems proper to assert that, in this exact situation, the circuit courts have consistently held that Rule 50(b) automatically reserves all questions of law raised by a mo-

tion to direct and vests in the trial and appellate court power *sua sponte* to direct judgment for the movant, where justice so requires. The privilege to make a motion subsequent to verdict goes only to the movant's procedural rights. While the courts did not find it necessary in the cases cited to discuss this provision of the rule, their conclusion as to power, regardless of whether a post trial motion is made, is consistent with the decisions of this Court and the language of the rule itself.

It can be stated unequivocably that the district court has power to direct a verdict on issues of law. Mr. Chief Justice Hughes, in *Herron v. Southern Pacific Company*, 283 U. S., 91, 75 L. Ed., 857 (1931), at page 861, said:

> "Where * * * and the question is one of law, the judge has the right and duty to direct a verdict for the defendant."

On the authority of *Baltimore & Carolina Line v. Redman, supra*, it can be stated further, that the supervisory power, inherent in both the federal district and circuit courts, includes the right *sua sponte* to direct judgment notwithstanding the verdict, where issues of law have been raised by proper motion during trial and expressly reserved by the court. Quoting again from that opinion (page 660):

> "This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant."

A careful reading of the last two sentences of Rule 50(b) can lead to no other conclusion because it is there explicitly provided that, whether or not a verdict has been returned, the court may direct the entry of judgment as if

the requested verdict had been directed. Thus, regardless of whether the movant has availed himself of the privilege extended by Rule 50(b) to make the post-trial motion, under both the *Redman case* and the express language of the rule, the trial judge and, therefore, the appellate Court *sua sponte* may act on the issue of law automatically reserved thereunder and, if proper, direct judgment for the movant notwithstanding the verdict. Such a construction is sound, under the cases cited, and conforms to the direction of Rule 1 that the rules "* * * shall be construed to secure the just, speedy, and inexpensive determination of every action." As pointed out in the Redman opinion, such procedure gives "* * * better opportunity for considered rulings, made new trials less frequent * * *."

A contrary construction, requiring the post-trial motion in order to vest power in the appellate court to direct judgment, rather than a new trial, would give rise to a status similar to that existing after the Redman decision, whereby, if the trial judge inadvertently forgot to reserve the question, the *Slocum rule* was applicable and ultimate justice was delayed—a result that Rule 50(b) was expressly designed to obviate. It is hardly conceivable that the committee drafting the rules would, with the *Slocum case* and the purpose of the rules in mind, have protected the district court against its own neglect to reserve, and, in the same breath, have created a pitfall for counsel. That this was not the committee's intent is proven by its Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, prepared by the Advisory Committee on Rules of Civil Procedure, dated June, 1946, at page 64. Counsel for respondent are just advised that this Court has recently acted on this report, and, in consequence of such advice, have eliminated a quo-

tation therefrom that had been made in this argument. Doubtless the Court has also noted articles on the proposed amendments by Mr. Walter P. Armstrong, past President of American Bar Association and member of the Advisory Committee, in The Lawyer and Law Notes, Vol. 1, No. 1, Fall Issue, 1946, page 3, and in 4 F. R. D., 124, at page 125.

As to the intended effect of the controverted language of Rule 50(b), it was only reasonable to provide that the movant, subsequent to an adverse verdict, could remind the court of its power to direct judgment notwithstanding the verdict. Also, where, as stated in the rule, the motion is denied or "* * * for any reason is not granted * * *" that the movant could compel the trial court to review the issue of law raised by the earlier motion, and either refuse it again or, if the court has remained silent, take positive action by either denying or granting the basic motion.

This provision seems to be, as already stated, directed solely to the procedural rights of the movant in the lower court; it affects the appellate court only to the extent that a denial by the trial judge creates a secondary error subject to correction on appeal.

The primary purpose in the adoption of Rule 50(b) was the promotion of simplicity in federal procedure. What could be simpler than a rule that a motion for a directed verdict, automatically and of its own force, reserves the question of law posed thereby until and after the jury has rendered its verdict? The trial judge can then correct any error, either *sua sponte* or by granting or refusing a subsequent motion. If the trial judge errs either way, the appellate court can then take advantage of the legal issue thus automatically reserved for its consideration, reweigh the evidence and correct the error below. New trials are thus avoided: speedy justice is done.

The Municipal Court of Appeals for the District of Columbia, in *Resnick v. Wolfe and Cohen, Inc., et al.*, 49 A. (2), 809, December 4, 1946, so interpreted Rule 46(b) of the lower court, which is substantially identical with federal Rule 50(b), saying:

> "* * * The practice of submitting cases to the jury and reserving determination of questions of law raised on motion for directed verdict, has received strong commendation in this jurisdiction and elsewhere. *Shelemaker v. Capital Transit Co.*, 79 U. S. App. D. C., 102, 143 F. (2), 142; *Fratta v. Grace Line, Inc.*, 2 Cir., 139 F. (2), 743. The Municipal Court Rule conforms to the federal rule and the reasons which have led to approval of the practice under the federal rule leads us to commend the same practice to the municipal court."

III

What effect, if any, have Rules of Civil Procedure 38 and 61 on this case?

Petitioner's counsel cite neither reason nor authority showing that either Rule 38 or Rule 61 has any relevance here; they use these rules to catapult themselves into a discussion of the merits. Is it possible that opposing counsel believe that this Court may, as it did in *Berry v. United States, Conway v. O'Brien* and *Halliday v. United States, supra*, reweigh the evidence and find it unnecessary to decide the questions of procedure under Rules 50(a) and 50(b)? In these cases the orders granting *certiorari* were unlimited; the order here limits the review to questions of federal procedure (R. 150). If it be that, technically speaking, Rules 38 and 61 are within the order, counsel for respondent are unable to find any question arising under these rules for discussion here. Their only application is to require that the mandate of the seventh amendment be obeyed.

It has long since been settled by this Court that the seventh amendment follows the common law in preserving the right of trial by jury. The established common-law powers, such as reserving questions of law arising during trial, and taking verdicts subject to ultimate ruling on questions reserved, must be regarded as among the common-law rules "* * * to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Baltimore and C. Line v. Redman, supra.*

The court below did not expressly restate the elementary test to determine whether the evidence was legally sufficient to support a verdict, but its careful analysis of the law and painstaking weighing of the evidence, prior to deciding to direct judgment, demonstrate its compliance with the federal rule restated in *Slocum v. United States, supra,* and in *Gunning v. Cooley,* 281 U. S., 90, 74 L. Ed., 720, 724 and 725. Actions speak louder than words!

Granting all inferences that could reasonably be drawn from the entire evidence in petitioner's favor and viewing his testimony as charitably as possible, in accordance with the proper test, the court below determined that on all the evidence there was not sufficient basis for a verdict for plaintiff and that defendant's motion to direct should have been granted by the trial judge.

It follows, since the court below concluded that there were no facts worthy of submission to the jury, that there was no unconstitutional re-examination of the facts by the court below. Whether there was any evidence for the jury was a question of law properly reviewed on appeal. Neither the action of the trial court in erroneously deciding *contra,* nor the consequent verdict of the jury, can convert this question of law into a question of fact.

IV

Was there error below going to the merits?

PLAINTIFF FAILED TO PROVE LEGAL TITLE

Counsel for respondent cannot state the controlling South Carolina rule more clearly or succinctly than it appears in the opinion below, R. 141, 153 F. (2) at 578.

The record tends to confuse, because plaintiff was attempting to prove paper title, title by adverse possession for twenty years giving rise to the presumption of a grant, title by adverse possession for ten years, and actual possession as of the time of the alleged trespass in September, 1941, all at the same time.

Plaintiff's theory as to his chain of paper title—which he first disclosed on the trial, to the complete surprise of defendant—was that it went through his mother, back to his father and then back to his grandfather. Plaintiff introduced the deed from his mother, dated and recorded in 1920, with the attached plat (R. 51). Plaintiff also introduced the deed from his grandfather to his father, dated and recorded in 1888, covering two tracts—one of 248 acres, plus another of 72 acres, making a total of 320 acres (R. 68).

The link between plaintiff's father and mother was missing. Plaintiff was faced with two substantial difficulties in closing his link. First, was the persuasive, if not conclusive, evidence offered by defendant *contra* the identity of the two tracts of land, and, second, that there was no deed of record from plaintiff's father to his mother. It was in connection with plaintiff's effort to overcome the second difficulty, that plaintiff offered the parol testimony to prove that the title passed from his father to his mother, and that there was a deed from his father to his mother in 1917.

This is the testimony that the court below held should have been excluded by the district court on defendant's objection and stricken on defendant's motion (R. 141-142, 153 F. (2) at 578).

Plaintiff testified at pages 3-21; plaintiff's witness Harrison at page 21 and plaintiff's brother at page 26. The motions to strike are found at page 42. The record became confusing, and patience was required to keep it straight. The learned trial judge became confused.

Defendant made a motion for new trial on after-discovered evidence in the district court (R. 74) and submitted therewith copies of two instruments from the registry office for Dorchester County certified by the clerk of court. The first was a mortgage from plaintiff's father to one J. H. Cone, dated and recorded in 1928 (R. 81), and the second was a deed from plaintiff's father to plaintiff's brother, Owen C. Cone, dated and recorded in 1932 (R. 85). Both instruments covered all the land conveyed to plaintiff's father by the deed of plaintiff's grandfather in 1888, carried a covenant of general warranty by plaintiff's father, and the deed was a conveyance in fee simple.

The circuit court below did not find it necessary to pass on the denial of this motion (R. 146, 153 F. (2d), 581), but respondent submits on the general equity of the case that this record evidence is conclusive that plaintiff's father did not execute a deed to plaintiff's mother in 1917, or at any other time, covering a portion of the land conveyed to plaintiff's father by the deed from plaintiff's grandfather in 1888.

Petitioner's brief (page 18) criticizes the court below for the sentence in the opinion reading: "It may be noted that plaintiff's deed from his mother, contrary to almost

universal practice, makes no mention whatsoever of the source of his grantor's title." (R. 141). Opposing counsel then assert, without basis, that the court below placed this omission as evidence on the scales against plaintiff to prove that the mother had no title, and closes with the sentence "Not only does the record fail to indicate any such inference, but the universal practice in land matters in South Carolina is not to include the source of title." No authority is cited for this bold statement.

The record does show that the deed from plaintiff's grandfather to plaintiff's father, dated in 1888, contained unusually extensive references to the sources of grantor's title. (R. 68-70). The same is true as to the mortgage from plaintiff's father to J. H. Cone, dated in 1928 (R. 81), and also the deed from plaintiff's father to Owen C. Cone, dated in 1932 (R. 85).

The record shows also that the source of the grantor's title was stated in the following deeds introduced by defendant:

(a) From Perry to defendant (R. 57-9),
(b) From Waring to Perry (R. 59-63),
(c) From the Master to Waring (R. 62-4).

This evidence seems to vindicate the comment by the court below, when it is remembered that all three of the deeds executed by members of the Cone family referred to the source of the grantor's title.

In the face of the record, a somewhat remarkable proposition is found commencing with the last paragraph on page 27 of petitioner's brief. This opens with the statement that it was an issue of fact for the jury whether the disputed land was a portion of the grandfather's (Cone) land or a portion of the Waring plantation conveyed to defend-

ant, and continues: " * * * The only complaint then, of the plaintiff's perfect chain of title, would be a missing link between his father and his mother. It is patent that such a defect did not deny the defendant of a fair trial and such defect is a matter of form and not of substance. If the disputed land was a part of the Cone holdings, the plaintiff's witness, Owen Cone, testified in open court and it will be admitted by the defendant, is the present holder of the estate lands and all the interest of Miles Cone, the father, and would be the present holder of the title of the disputed lands as a part of the father's and grandfather's. Such a defect of form can readily be cured by a quit-claim deed from Owen Cone to his brother, the plaintiff. But the plaintiff submits that the said Owen Cone, having appeared in open court under oath, declaiming any interest in the disputed lands and acknowledging the ownership and title thereof to be in the plaintiff, it would be repugnant to substantial justice to send the case back for a new trial for the execution of a mere formal quit claim." Does this constitute a belated admission that plaintiff has never had title to the disputed tract?

As to the ruling below that parol evidence was inadmissible to prove title to real estate.

The petition for *certiorari* and supporting brief (p. 19) charged that the court below ruled that parol testimony was inadmissible to prove possession of the 106.5 acre tract of land in question by plaintiff's mother, father and grandfather. Respondent answered this, in its brief in opposition, commencing at page 3, showing that the court below did not make such a ruling; that the evidence was received to prove the phantom deed from plaintiff's father to his mother. The brief here (page 24) renews this charge.

The motions to strike are found at R. 42. They are perfectly clear when taken in connection with the preceding testimony and objections thereto. The first motion was to strike all the testimony "pertaining to the back title" * * * "in that there has been no linking up by the plaintiff with the deed" from plaintiff's grandfather to his father in 1888. The second motion was to strike "all evidence of any title or semblance of title prior to Carolina Cone * * *"—that is, plaintiff's mother. The court below referred to this as "* * * testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him" (R. 141, 153 F. (2), 578). The parol evidence was offered and received to prove a deed from plaintiff's father to his mother. This was spoken of by the trial judge, by reason of his misapprehension, as a "lost deed" (R. 103). A better description is "phantom deed".

Appellant's (respondent's) brief in the court below (pages 31-37) asserted that the evidence was inadmissible because

(a) Title to real estate cannot be proved by parol, citing *Spence v. Spence*, 4 S. C. L. (2 Brev.), 460, 461; *Mayo v. R. R. Co.*, 40 S. C., 517, 519, 19 S. E., 73; *Metz v. Metz*, 48 S. C., 472, 488, 26 S. E., 8; *Luco v. United States*, 64 U. S. (23 How.), 515, last paragraph on 551; *Hayes v. United States*, 175 U. S., 248, 257, 44 L. Ed., 150, 154; and

(b) Parol evidence of a deed—particularly an unrecorded deed—is admissible only upon prior proof (1) of the existence of the deed, including the due execution thereof, (2) that the deed has been lost or destroyed without fault, and (3) that an appropriate search has been made therefor, citing, amongst other cases, *Floyd v. Mintsey*, 39 S. C. L. (5 Rich. L.), 361, 373; *O'Neal v. Isbell*, 43 S. C. L.

(9 Rich. L.), 367, 370; and *Uzzell v. Horne*, 71 S. C., 426, 431, 51 S. E., 253.

It was with these and other authorities before it that the circuit court below held that this tesimony was improperly admitted and retained in the case. The court evidently did not think it necessary to cite authority to support such elementary propositions.

As to the Prejudice to Defendant.

Plaintiff's claim of title was in part that in 1917 plaintiff's father had been in possession of this distinct 320-acre tract for twenty-nine years under the deed of plaintiff's grandfather in 1888 and had acquired title thereto by presumption of a grant. Note how perfectly the contested evidence filled in the gap in plaintiff's title! Plaintiff testified (a) that the 106 1/2-acre tract was part of the larger 320-acre tract owned by his father and that his brother owned the remaining portion thereof. It promptly developed that this was pure hearsay on the part of plaintiff, when plaintiff, in reply to a question by the court, testified (b) that plaintiff's father said that his grandfather had owned the 106 1/2-acre tract. This left a gap between the title of plaintiff's father and the title of plaintiff's mother which plaintiff next proceeded to close by the parol testimony in question (c), that his father had deeded the 106 1/2-acre tract to his mother.

Without this contested evidence, plaintiff had only the deed from his mother in 1920, with the Postell plat incident thereto. This amounted to nothing but a description and identification of the 106 1/2-acre tract. It gave plaintiff no title thereto and plaintiff could prove no element of possession thereof, so as to claim title by adverse possession.

This evidence enabled plaintiff to argue with some plausibility to the jury that the 106 1/2-acre tract had had a normal family history—that it was deeded from plaintiff's grandfather to plaintiff's father and then divided by his father; the 106 1/2-acre tract deeded to plaintiff's mother and then to plaintiff, and the balance deeded direct to plaintiff's brother. This was a plausible story, appealing to the average jury in the confusion of the evidence as to boundaries, as shown by the verdict. There was absolutely no competent evidence upon which to base this argument.

The danger of allowing title to real estate to be proved by parol evidence is glaringly shown by the indisputable and after-discovered record evidence, presented on the motion for a new trial, that plaintiff's father, subsequent to his alleged deed to plaintiff's mother in 1917, had first mortgaged his entire 320-acre tract (R. 81), and later conveyed this entire 320-acre tract to plaintiff's brother (R. 85), with each instrument carrying the father's warranty covering the entire 320 acres. Plaintiff's brother Owen Cone was the grantee in this deed. Did plaintiff know this equally well?

As to the Church Case.

Petitioner's brief urges more than once that the interpretation of the controlling South Carolina rule by the court below was inconsistent with the rule laid down in *Macedonia Baptist Church v. City of Columbia*, 195 S. C., 59, 10 S. E. (2d), 350. Consideration of that opinion will confirm that it is entirely consistent with the South Carolina cases cited, quoted from and followed by the court below.

The *Macedonia Church case* was an action to recover damages alleged to have been caused by surface waters

drained by the City of Columbia from its streets and cast upon the real estate of the church. The undisputed evidence proved that the plaintiff church had received a deed to the lot of land in the City of Columbia on June 14, 1914, and had then erected and had since maintained, occupied and used a church building thereon until the flooding on July 16, 1938. The trial judge held, in denying a motion for a new trial, that plaintiff had proved title (evidently by proving actual and adverse possession of the lot under claim and color of title for a continuous period of more than twenty years prior to the damage).

This proved title by presumption of a grant. The city did not even claim either possession of or title to the lot in itself. It was undisputed that the church had enjoyed actual, exclusive and continuous possession under its deed for more than twenty-four years. It was on these facts, and to the question whether the court below was correct in holding that the church had proved title, that the court was speaking. In other words, the court was there dealing with a case in which the undisputed evidence proved not only that the church was in actual possession of the lot as of the time of the damage, but also that the church had proved title by presumption of a grant and had constructive possession as an incident thereof. The *Macedonia Church case* is in no wise inconsistent with *Littleton v. Roberts*, 181 S. C., 303, 187 S. E., 349, from which the court below quoted and on which it relied in determining whether plaintiff had sufficient possession as of the time of the trespass to justify him in maintaining the action *quare clausum fregit*, in view of defendant's conflicting possession at the same time. (R. 147, 153 E. (2), at 581).

There was no conflicting claim of possession by the city in the *Macedonia Church case*. The two cases related to two

entirely different factual situations. Plaintiff here utterly failed to prove actual possession under his deed at any time, much less continuous for ten years; or for twenty years, as the church did. Since there was no deed from plaintiff's father to plaintiff's mother, plaintiff could not claim benefit from any possession of his father and grandfather because the benefit of whatever title and possession plaintiff's father and grandfather may have had passed to plaintiff's brother under the deed from plaintiff's father to plaintiff's brother (R. 85).

There was no testimony of actual possession by plaintiff.

1. All the evidence relating to plaintiff's actual possession was furnished by plaintiff's own testimony. Plaintiff testified, first, on direct examination, that his hunting, getting wood and getting clapboards, "covering for out barns and houses," was done approximately in 1923 and 1925. "The Court: How did he get them, did he cut down trees? A. I cut some lying down and sawed them up and stood them up." (R. 4). Plaintiff testified on cross examination (with reference to these acts): "Q. When was that? A. That was 1923 and 1925, and all through there. Right on through there. Q. You haven't been on it since? A. Yes, sir. Q. When was the last time after 1923? A. I went practically every year. Q. You just went on it during hunting season? A. Yes, sir. Q. The rest of the year you didn't go on it? A. I would be busy, I didn't have time. Q. You live some distance from there? A. Yes, sir." (R. 13). He later said, on cross examination, "After I moved away from there I didn't do nothing"—that during the time the timber was being cut and just prior thereto he didn't do anything (R. 15). It is possible that the witness meant that after he had moved in 1923 to Ravenel, a distance of 15 miles, he "used to go out and camp a week at a time and hunt and

get wood, etc." (R. 16) This makes an apparent contradiction of plaintiff's former testimony that he cut clapboards and wood approximately in 1923 and 1925 (R. 4).

Paraphrasing the language of Judge Parton in *Stockley v. Cissna*, 119 F., 812, "There is no legal presumption that the plaintiff's actual possession began at the date of his deed from Allen (his mother), and there is no evidence from which the jury could reasonably and legally infer that his actual possession began then, or at any other date far enough back to constitute an adverse actual possession for more than seven (ten) years before the defendant's entry."

2. Plaintiff testified that he cut the clapboards "for covering for out barns and houses." (R. 4). He did not cut them for sale. He never stated that he had cut them frequently or extensively. He did not say that the outbarns or houses were numerous or large in size, so that many clapboards were needed. It is common knowledge that a clapboard lasts for a number of years. The only reasonable inference is that plaintiff cut a few clapboards from fallen trees on one or several occasions between 1920 and 1941—each cutting a temporary and inconsequential trespass. As stated, he limited his cutting of clapboards during this 21-year period to the years 1923 and 1925, "and right on through there"; and yet he testified positively that he had moved to Ravenel, 15 miles away, in 1923 (R. 16), and that after he moved he didn't do anything, except possibly that he went hunting on the land—he did not say every year, but "I went practically every year." (R. 13).

3. His testimony as to getting wood is subject to even more vagueness and uncertainty as to time, extent and frequency, as is his testimony with reference to clapboards.

4. Remembering that plaintiff bore the burden of proving the actuality and continuity of his possession, and that

"such possession must be clearly proved and shown" (*Thomas v. Dempsey*, 53 S. C., 216, 218, 31 S. E., 231; *Rochelle v. Holmes*, 2 S. C. L. (2 Bay), 487), it seems reasonable to assert that at most plaintiff proved that he got small amounts of wood and clapboards from fallen trees on this 106 1/2-acre tract of land on several occasions, with the time, number and character of such acts utterly vague and indefinite; and that plaintiff went hunting on the land during the hunting season, once a year for a number of years between 1920 and 1941. He did not say that he went hunting every year, but only "I went practically every year." (R. 13.).

5. The acts of possession and occupancy upon which the plaintiff relied were entirely too casual, occasional, infrequent and inconsequential to constitute evidence of actual or continuing adverse possession. Is it surprising that defendant never discovered plaintiff's fugitive and inconsequential trespasses?

6. Section 379(3) of the Code of South Carolina, 1942, emphasizes the failure of plaintiff's evidence. That section (quoted at page 21 of petitioner's brief) specifies that "land shall be deemed to have been possessed and occupied" (note the use and emphasis of both words), "Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." The requirement of actual occupancy is emphasized by the use of both "occupied" and "occupant." The sub-division does not designate "hunting."

The section does not limit or qualify the element of continuity or any of the other requisite elements of adverse possession; it merely says, in effect, that the acts specified shall amount to acts of actual possession and occupancy.

Plaintiff did not claim that the land "had been used for the supply of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant." "Husbandry", is used in the sense of "Agriculture; cultivation of the soil for food; farming, in the sense of operating land to raise provisions." Black's Law Dictionary, DeLuxe Ed., page 910. Plaintiff admitted that there had been no use of this kind. Plaintiff did not testify that he had used the land "for the ordinary use of the occupant." He admitted that he had never occupied any portion of the disputed land.

This narrows the question to whether plaintiff's testimony that he got wood from fallen trees on this land in "1923 and 1925 and all through there," and that on several occasions "he camped and hunted for a week at a time and got wood," manifestly for his campfires, amounted to testimony that plaintiff had for any period of time (much less for ten consecutive years) used the land "for the supply of fuel" within the meaning of this statute.

In *Bardin v. Commercial, etc., Co.*, 82 S. C., 358, 64 S. E., 165, the disputed woodland was a portion of a 441-acre tract conveyed to plaintiffs' deceased husband and father in 1882, on the other portion of which tract plaintiffs and their ancestor had lived for twenty-three years. The court emphasized that the ancestor and heirs had used the disputed land for the purpose of getting wood, straw and timber therefrom when needed and had also permitted their tenants so to do. The court again emphasized that their tacked possession was adverse and continuous for more than twenty years and that the disputed land had been "used for the supply of fuel and timber, the ordinary uses for which such land was fitted (citing Section 379)."

7. No South Carolina case has been found in which the court has discussed whether hunting is an act of pos-

session, but the general rule is that hunting is insufficient, 2 C. J. S., 549; citing *Camp Chicopee v. Eden*, 154 A., 306, 303 Pa., 150, 155, where the Court said, "An entry upon another man's lands to hunt or fish can never give title: *Wheeler v. Winn*, 53 Pa., 122." There is, however, a South Carolina case with reference to fishing in which a head note reads: "Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations." *Jackson v. Lewis*, 25 S. C. L. (Cheves), 259.

Plaintiff utterly failed to prove that he was in actual possession as of the time of trespass.

Plaintiff's evidence was utterly devoid of suggestion of possession at the time of the trespass. In his direct testimony, as already pointed out, he stated that the only times he had been on the land were on occasions when he hunted on it and got clapboards from it, which acts occurred in 1923 and 1925 (R. 4). On cross examination he admitted that he had never fenced the property, nor plowed it, nor that he went on it except occasionally during the hunting season. He stated that the last time he had walked all over the property was in 1923 and 1925. When closely questioned as to what he was doing about the property at the time the cutting occurred, he replied that he was doing nothing about it, in regard to farming it or living on it or fencing it or posting it (R. 12-15).

The amended complaint alleged in paragraph three (R. 2) that the trespass was committed by the cutting of the timber "during the month of September, 1941, without Plaintiff's knowledge or consent", and in paragraph four that since the fact of the cutting came to his knowledge plaintiff had "forbidden and used every reasonable means to have the Defendant desist from the trespasses

above set forth" (R. 2). Plaintiff testified that he saw about ten men, with three or four carts pulled by mules, cutting and hauling timber along about the latter part of September or October, 1941, but he didn't know how long they stayed in there. Plaintiff talked to some of them, but did not say that he protested or warned them—plaintiff did not talk with the man who was measuring the logs (R. 10). On cross examination plaintiff testified that he didn't complain to anybody except his lawyer, and that nothing was done by him (R. 14-15). Since the timber-cutting contract was dated September 18, 1941, and limited to sixty days (R. 22), it seems probable that the cutting had been going on for about two weeks before plaintiff discovered it. It seems remarkable that an extensive trespass of this kind, if it was one, could have been perpetrated and continued on a tract of 106 acres for any substantial length of time without discovery by plaintiff, if he had been in actual possession of the tract. Plaintiff's failure to complain or protest, and failure to demand that the cutting cease, when he discovered the trespass and talked with some of the men engaged therein, was not the normal reaction of an average South Carolina landowner.

The authorities cited by the court below are conclusive that these isolated acts of trespass on the property were not sufficient to establish the possession requisite to maintain this action. There is not a scintilla of evidence to the effect that at the time of the alleged trespass plaintiff was exercising any act of ownership, either actual or constructive. The acts by which plaintiff attempted to establish his possession were mere furtive comings and goings, such as a knowing trespasser would resort to, and not bold acts such as an established owner would commit. That plaintiff never had possession is made certain by the evidence adduced by defendant to prove its actual posses-

sion over a period of more than twenty years prior to the time of the trial.

As to Payment of Taxes.

Since the ultimate question on the merits was whether there was sufficient evidence of plaintiff's actual possession to go to the jury, and since the general rule admittedly is that payment of taxes does not constitute evidence of actual possession (2 C. J. S., 827), it seems irrelevant at this stage of the case to discuss the South Carolina rule as to what effect payment or non-payment of taxes may have as an element of proof in respect of title.

The South Carolina cases touching this question were, however, cited and commented on in the brief filed by respondent as appellant in the court below, as follows:

Payment of taxes for a number of years has been held to be some evidence that the State has parted with its title by grant or waiver. *Bardin v. Commercial, etc., Co.*, 82 S. C., 358, and cases cited at bottom of 359, 64 S. E., 165.

Later cases, however, raise doubt whether such evidence is competent for any purpose. "The payment of taxes is not evidence of title, as is supposed in popular myth, but the failure to pay is evidence that no claim was made." *Gadsden v. Investment Co.*, 99 S. C., 172, 180, 82 S. E., 1052. In *Saluda L. & L. Co. v. Fortner*, 162 S. C., 246, 251, 160 S. E., 594, the trial court, in an action to recover possession of land, ruled out evidence that plaintiff had returned the property for taxation, holding that it was not competent to show either possession or title or presumption of a grant. The Supreme Court said: "The Court was not without authority for its ruling (*Gadsden v. Investment Company*, 99 S. C., 172, 82 S. E., 1052); but even if the evidence should have been admitted for what it was worth,

we do not think its exclusion was reversible error * * *," and then pointed out that there was other evidence that plaintiff had returned the land for taxation.

THE EVIDENCE AS TO TITLE OF AND POSSESSION BY DEFENDANT

Defendant acquired title through the deed from Perry in 1924 (Ex. D-2, R. 57), based on the map as surveyed by Gaillard in August, 1923, and recorded on April 22, 1924, which is attached as Ex. D-1, R. 56A. Defendant proved by appropriate record evidence that Perry had acquired the property by deed from Waring in 1899, who in turn had acquired the property by inheritance from her parents. Defendant's title was traced back to a date prior to 1865, when the public records of Colleton County had been destroyed. It seems needless to burden the Court with a detailed discussion of this chain of title and the confusing evidence as to boundaries at this stage of the case. Defendant proved that when it acquired title in 1924 it began immediately thereafter and continually performed acts which demonstrated to the world that defendant had taken and was continuing complete and notorious possession of the 106.5-acre tract in question.

Defendant's evidence to this effect was summarized by the court below in this way (R. 144, 153 F. (2), 580):

> "* * * In brief, this proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Company, the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see

that defendant could have done much more to assert its possession."

This was based on the testimony of defendant's witnesses Beach (R. 31-35) and Bivens (R. 35-37). Plaintiff's witness Cooley, who did the cutting for another corporation under a contract with defendant, testified on cross examination that when he went there to start the cutting in September, 1941, the agents of defendant were in charge of the property—that the lines were well marked by defendant with yellow X marks on the trees, and that the agents of defendant directed as to what timber was to be cut, etc. (R. 23). "Q. So that they were exercising possession at that time, were they not? A. Very much so." (R. 24.) Plaintiff's witness—his brother, Owen Cone—testified that he did not see the fire line, though he wouldn't say there wasn't one (R. 30). The continuous existence of these notorious acts of possession was not denied beyond plaintiff's assertion that he had never seen the postings and the fire line, one of which was established along the boundary line between the disputed tract and the Miles Cone tract of 320 acres.

CONCLUSION

It is respectfully submitted that on the entire evidence the trial judge should have directed a verdict on the compelling authority of *Littleton v. Roberts, supra,* 181 S. C., 303, 187 S. E., 349, and that, having failed so to do, there was no course for the court below to take other than the one that it followed.

Petitioner had a good deal to say in the petition for *certiorari* and the brief filed therewith as to the prejudice that petitioner would suffer by the entry of judgment below, because of his view that this would be *res adjudicata* as to petitioner's title to the land in question. Respondent

was able to assure him in its brief in opposition to *certiorari* that the doctrine of *res adjudicata* would not apply, citing *Carr v. Mouzon*, 93 S. C., 161, 76 S. E., 201, and calling particular attention to the language of the Supreme Court of South Carolina in *Littleton v. Roberts, supra.*

Respectfully submitted,

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MOTION AS TO COSTS

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER.

versus

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
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Paper Company.

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